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CHARLES ELMORE

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1928.

No. [redacted] 22

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
*Petitioner,*

*v.*

GUARDIAN TRUST COMPANY,
Henry C. Flower, Receiver *Respondent.*

## PETITION FOR WRIT OF CERTIORARI.

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January 9, 1929.

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# Supreme Court of the United States

OCTOBER TERM, 1928.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,
*v.*
GUARDIAN TRUST COMPANY,
Respondent.
No.

## PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The Kansas City Southern Railway Company, the petitioner herein, respectfully presents its application for a writ of certiorari, requiring the United States circuit court of appeals for the eighth circuit to certify to the Supreme Court of the United States for its review and determination the case of *Guardian Trust Company,* Appellant, *v. The Kansas City Southern Railway Company,* Appellee, decided May 18, 1928 (28 F. (2d) 233). Petitioner's motion for a rehearing was filed July 16, 1928 (Rec. 751-821), and was overruled October 18, 1928 (Rec. 821).

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NOTE: The transcript of the record brought to this Court consists of two volumes. The first, in point of time, is a copy of the record in the original case in this Court, in *Guardian Trust Co.* v. *The Kansas City Southern Ry. Co.,* reported in 240 U. S. 166. References to its pages are as follows: "(S. C. Rec. )." The second volume is a transcript of subsequent proceedings in the district court and circuit court of appeals for the eighth circuit. References to its pages are as follows: "(Rec. )."

## Principal Question Involved.

The principal question involved in this application is the following:

Was the district court for the western district of Missouri, upon receipt of the mandate of this Court in *The Kansas City Southern Railway Company* v. *Guardian Trust Company,* 240 U. S. 166, required or authorized to tax against petitioner, in its final decree, costs "as between solicitor and client," including therein the disbursements of the Trust Company for attorneys' fees and other expenses incurred during the entire period of the litigation?

The district court held (Rec. 704-720) that only costs as between party and party should be taxed, and rendered its final decree accordingly (Rec. 128-131). Such costs have been duly taxed and paid, and are not involved herein. Our contention is that the district court was clearly right in its ruling.

The circuit court of appeals for the eighth circuit, upon appeal by the Trust Company, held that our federal courts possess the powers of the English Chancery Court over the taxation of costs, and, purporting to exercise those powers, it reversed the decree of the district court (Rec. 722-749) and remanded the case with instructions to tax costs "as between solicitor and client." Its decree requires the taxation, as costs against petitioner, of attorneys' fees, and other disbursements of the Trust Company, in the sum of approximately $300,000 (Rec. 59). Petitioner seeks a review by this Court of the decree of the circuit court of appeals.

It is believed that this highly important question of federal practice can be determined by the Court as a matter

of law, without opening the record in this twenty-eight year old case.

## Summary and Short Statement of the Matter Involved.

For a statement of the facts involved in this litigation up to the time of this Court's decision, 240 U. S. 166, we adopt the statement of facts contained in the opinion.

## Chronological Statement of the Proceedings.

In order that the proceedings subsequent to this Court's decision, above referred to, may be viewed in relation to the case as a whole, we summarize the entire proceedings from beginning to end in chronological order. A somewhat fuller statement will be found in the accompanying brief.

(a) In September, 1900 (S. C. Rec. 3) the Cambria Company, a judgment creditor of the Belt Company, brought suit for an accounting, in the federal court at Kansas City, Missouri, against the Trust Company, praying for a cancellation of the alleged indebtedness of the Belt Company to the Trust Company, and that the collateral held by the Trust Company to secure said alleged debt be released and subjected to the Cambria Company's debt. The gravamen of the bill was that for a period of years the Trust Company, through a community of officers and directors, had dominated and controlled the Gulf Company and a number of affiliated companies, including the Belt Company, and that by reason of such domination and control had imposed large and unwarranted charges against those companies, including the Belt Company, and that upon a true accounting between the Belt Company and the Trust Company, it would appear that the Belt Company was in no way in-

debted to the Trust Company. The Trust Company answered the bill (S. C. Rec. 33), consenting to an accounting (S. C. Rec. 48).

(b) The Belt Company and its receivers intervened in the action in 1901 by ancillary bill (S. C. Rec. 97). This ancillary bill was filed pursuant to stipulation (S. C. Rec. 890), providing that "the accounting * * * sought by the said ancillary bill shall be expedited by all of the parties hereto." The receivers, in becoming parties to the action, were acting under instructions contained in the order of the court appointing them (S. C. Rec. 29). The ancillary bill made substantially the same allegations against the Trust Company as were made by the Cambria Company and prayed for a cancellation of the alleged indebtedness and a release of the collateral security. The Trust Company answered the ancillary bill (S. C. Rec. 115), affirming the alleged indebtedness and offering to make such accounting as the court might require (S. C. Rec. 148). Amended pleadings were subsequently filed.

(c) In April, 1905, petitioner, pursuant to stipulation (S. C. Rec. 164), intervened in the case (S. C. Rec. 166), upon the ground that the Gulf mortgage and the Belt mortgage covered after-acquired property, so that petitioner, as the purchaser under foreclosure sales, was entitled to the securities in the Trust Company's hands, or the properties represented by such securities.

The Trust Company answered the intervening petition (S. C. Rec. 186) alleging, among other things, that petitioner was liable for the Belt Company's debt. This liability issue, which thereafter became the dominant issue in the action, was one which the Trust Company itself injected into the case in 1905. It is largely the attorneys' fees and

other expenses of the Trust Company incurred in litigating this issue which it now seeks to impose upon petitioner.

(d) Testimony was taken, the case was argued and submitted to the special master in the summer of 1906, and in June, 1910, the lower court rendered a final decree (S. C. Rec. 903). It reduced the debt of the Belt Company to the Trust Company by three items, and in other respects affirmed it. The properties of the Central Improvement Company, which were the most valuable part of the collateral held by the Trust Company, were awarded to petitioner; and petitioner was held to be in no way obligated for the payment of the Trust Company's debt against the Belt Company.

(e) The Trust Company appealed to the circuit court of appeals for the eighth circuit, alleging as error (201 Fed. 817) that the district court erred, first, in incorporating in the decree the finding that petitioner was not liable for the Belt Company's debt; secondly, in awarding the Central Improvement Company's properties to petitioner; and, thirdly, in taxing one-third of the costs against the Trust Company.

(f) The circuit court of appeals, on October 22, 1912, reversed the decree of the lower court, holding that petitioner was liable for the debt of the Belt Company (201 Fed. 811).

(g) A reargument was had in the circuit court of appeals and a second opinion handed down, on December 2, 1913 (210 Fed. 696), affirming, in somewhat more vigorous and emphatic language, the conclusions reached in its first opinion. The lower court was directed (pp. 723, 724) to enter a specific decree, complete in all its details, including

the taxation of "costs". The Trust Company was awarded a money judgment against petitioner for the amount of the Belt Company's debt, with a sale of the collateral in the event of a failure to pay the judgment.

The court also (pp. 722, 723) denied the petition of three intervening stockholders of the Trust Company, asking that the lower court be directed, after the entry of the amount of the decree, to render a further decree in favor of the Trust Company and against petitioner for the aggregate amount of the attorney's fees, stenographers' fees and expert accountants' fees incurred by the Trust Company, or, in the alternative, that the Trust Company be permitted to bring an independent suit for such sums.

(h) Petitioner appealed to this Court (S. C. Rec. 1057), and, in response to a motion to dismiss, filed its application for certiorari, which this Court, by order entered May 11, 1914, held should be granted on account of the nature of the questions involved, in the event that an appeal did not lie.

(i) The decree of the circuit court of appeals was affirmed by this Court on February 21, 1916, the Chief Justice and one of the Associate Justices dissenting (240 U. S. 166). In April, 1916, petitioner paid the Trust Company in full the debt and interest, amounting to $821,623.28 (Rec. 129).

(j) Six years later, in 1922, upon notice for a settlement of the decree in the district court under the mandate of this Court, application was made by the Trust Company (Rec. 16) for the taxation of costs as between solicitor and client. The motion was at first sustained by the district court in June, 1923 (Rec. 691-704), upon the existing record and without new issues or additional evidence, and a master was

appointed to take and state the account of disbursements made by the Trust Company. This was done; the report of the master showing that approximately $300,000 should be taxed against petitioner on account of the Trust Company's attorneys' fees and other disbursements from beginning to end (Rec. 59). The ordinary costs as between party and party were small, and have been paid in full.

Later, the district court granted a reargument of the entire question, and after further and exhaustive consideration, reached the conclusion, in March, 1926, that only costs as between party and party were taxable against petitioner (Rec. 704-720). A final decree (Rec. 128) was thereupon entered in accordance therewith.

(k) The Trust Company appealed from the final decree to the circuit court of appeals for the eighth circuit, and the latter, on May 18, 1928 (Rec. 722), reversed the decree of the lower court, and remanded the case with instructions to tax costs "as between solicitor and client." Petitioner filed a motion for a rehearing (Rec. 751-821), which was overruled on October 18, 1928 (Rec. 821).

(l) It is to review this last-named judgment that this application for certiorari is made.

## Reasons Relied On for Allowance of the Writ.

I.

It is the practice of this Court (*St. L., K. & C. R. Co. v. Wabash R. Co.*, 217 U. S. 247, 251) to issue its writ of certiorari to review the action of the circuit court of appeals in passing upon the proper execution of this Court's mandate, where, as here, controversies have arisen in reference thereto.

This Court (240 U. S. 166) affirmed the decree of the circuit court of appeals (210 Fed. 696), which (pp. 723, 724) directed the entry, in the district court, of a specific decree, complete in all its details, awarding a money judgment in favor of the Trust Company, with "costs," and left the "taxation of costs" to the court below "under the principles, rules and practice in equity."

The circuit court of appeals has construed the opinion and mandate of this Court to mean the taxation of costs "as between solicitor and client." We confidently contend that this was error, and that the opinion and mandate of this Court contemplated and required only the taxation of costs in the usual manner, between party and party.

## II.

The opinion and judgment of the circuit court of appeals are directly in conflict with the Act of Congress of 1853 (28 U. S. C. A., sec. 571, 572), providing that certain specified fees "and no other" shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States. Its provisions are as follows:

> The following fees and no other shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, and to district attorneys, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.

> On a trial before a jury, in civil or criminal causes or before referees, or on a final hearing in equity or admiralty, a docket fee of $20: Provided, That in cases of admiralty and maritime jurisdiction, where the libelant recovers less than $50, the docket fee of his proctor shall be but $10.

Since the date of that enactment, it has been the uniform and accepted practice in federal courts to refuse to tax as costs attorney's fees and other expenses incurred by the successful party in excess of the amount fixed by that statute. This rule was authoritatively established in *Oelrichs* v. *Williams,* 15 Wall. 211, and has since been followed and accepted as the settled rule of practice and procedure. The only exception to the rule, aside from statutes imposing attorneys' fees as costs or as a part of the judgment, is in the case of allowances made in the administration of trust funds or trust estates, which is a feature wholly absent in this case, as is pointed out in the brief.

## III.

The opinion and judgment of the circuit court of appeals are in conflict with the following applicable decisions of this Court:

*The Baltimore,* 8 Wall. 377;
*Oelrichs* v. *Williams,* 15 Wall. 211;
*Tullock* v. *Mulvane,* 184 U. S. 497;
*Missouri, K. & T. R. Co.* v. *Elliott,* 184 U. S. 530;
*Missouri Pacific R. R. Co.* v. *Larabee,* 234 U. S. 459;
*Sioux County* v. *National Surety Co.,* 276 U. S. 238.

IV.

The decision of the circuit court of appeals is in conflict with the following decisions of the court of appeals for the seventh circuit: *McIntosh* v. *Ward*, 158 Fed. 66; *Fraser* v. *Cole*, 214 Fed. 556; and also in conflict with the following decisions of the court of appeals for the fourth circuit; *Kell* v. *Trenchard*, 146 Fed. 245; *Leary* v. *United States*, 257 Fed. 246; and with the following decisions of the court of appeals for the second circuit: *Motion Picture Patents Co.* v. *Steiner*, 201 Fed. 63; *Marks* v. *Leo Feist*, 8 F. (2d) 460.

V.

The opinion and judgment of the circuit court of appeals, authorizing the taxation of costs as between solicitor and client, under or by analogy to the English system of taxation of costs, where attorneys' fees, fixed by law, are included as costs in all cases, constitute a radical and revolutionary departure from the usual, accepted and established course of judicial proceedings in this country from its beginning until the present time.

If the courts of this country are to incorporate into its jurisprudence the English doctrine of the taxation of costs as between solicitor and client, it is a matter of such great importance to all citizens, as well as to bench and bar, as to invoke the deliberate consideration and judgment of this Court.

The opinion and judgment of the circuit court of appeals operate to deny one of the fundamental principles of our government, that every one is entitled to free access to our courts. This essential right of every citizen would cease to exist if an intending litigant were threatened and menaced with punishment of this character for his failure,

perhaps through no fault of his own, to anticipate the conclusion which some court or jury may ultimately reach as to the merits of his case.

## VI.

The extraordinary character of the judgment of the court of appeals is plainly apparent when we consider the conceded fact that it requires petitioner to pay the attorneys' fees and other disbursements of the Trust Company during the entire period of this litigation, from beginning to end. This period includes the Trust Company's appeal to the circuit court of appeals, where the questions involved were regarded by that court as of such difficulty that it permitted a reargument of the case (201 Fed. 811, 210 Fed. 696), and of such grave importance by this Court that it held (May 11, 1914) that if an appeal did not lie, *certiorari* should be granted because of the nature of the case, and where, upon the final decision of this Court (240 U. S. 166), the Chief Justice and one of the Associate Justices dissented. These proceedings followed the rendition of the final decree in the lower court in June, 1910 (S. C. Rec. 903), and involved only questions of law.

A judicial decision that petitioner should be penalized by the payment of the Trust Company's expenses for attorney's fees and other disbursements, for resisting the Trust Company's appeal to the circuit court of appeals, and for appealing from that court to this Court, where exceedingly difficult and complicated questions of law were involved, is obviously of a radical and revolutionary character. The duty of this Court to review a decision of that character would appear to be beyond question.

VII.

The circuit court of appeals has, we respectfully submit, committed a grave error of a most prejudicial character by incorporating in its opinion (Rec. 735) the astounding statement concerning what it is pleased to call "the vexatious character of the whole litigation." It does this not only in a case where, as pointed out in the preceding paragraph, exceedingly difficult and complicated questions of law were involved, but in face of the fact that the evidence in the case was not brought to that court and was not before it (201 Fed. 816); in face of the fact that no issue of that character was made, or evidence taken, or opportunity afforded for the production of testimony; and, furthermore, in face of the fact that when demand was being made in the district court by the Trust Company for the taxation of costs as between solicitor and client, petitioner filed its application for leave to adduce testimony to prove the entire good faith of the litigation from beginning to end, setting forth in detail the facts sought to be proved (Rec. 33); and this application was denied (Rec. 45).

This imputation of bad faith not only has no support whatsoever in the record, but is coupled with a denial of any and all opportunity to enjoy the fundamental right of a day in court, guaranteed to every citizen.

VIII

The circuit court of appeals decided certain important questions of general law in a way probably untenable and in conflict with the weight of authority, as follows:

(1) It held that the Trust Company, a pledgee of securities as collateral to the debt of the Belt Company, was compelled to litigate not only the validity and amount of

its debt, but the title of the pledgor to the pledged property; and that it, under these circumstances, was entitled to a taxation of costs as between solicitor and client. But it appeared without contradiction that the Trust Company litigated the amount of its claim and the title to the pledged property, not in caring for or preserving the pledged property, nor for the benefit of the Belt Company, which was the pledgor, but to protect its own individual and personal interest as a creditor of the Belt Company. In these circumstances, the great weight of authority is against the right of the Trust Company either to a taxation of costs as between solicitor and client, or to an allowance out of a fund.

(2) It held that the complainants brought suit to charge the Trust Company as an express or constructive trustee, or to charge it with the obligations resting upon trustees, and that the Trust Company is therefore entitled to the taxation of costs as between solicitor and client. But the conceded fact is that the Trust Company in its answer disclaimed any trust relationship in the matter complained of, and denied that it had assumed any of the obligations resting upon trustees, and the finding and decree of the court upon this issue was in favor of the Trust Company. It thus appeared that there was no trusteeship, and that none of the obligations of trustees had been assumed. In these circumstances, the great weight of authority is against the right of the Trust Company either to a taxation of costs as between solicitor, or to an allowance out of a fund.

(3) It held that the Trust Company, in fastening a liability upon petitioner for its debt against the Belt Company, had brought a fund into the constructive possession of the court, and that it, therefore, was entitled to an allow-

ance of costs as between solicitor and client, by analogy to a creditor who sues in behalf of himself and others and succeeds in bringing a fund into court for distribution. But the conceded fact is that the Trust Company recovered a personal judgment against petitioner, without segregating a fund in kind and bringing its corpus into a court of equity for distribution. This judgment was promptly paid in full, with interest. The Trust Company is not, therefore, entitled to costs as between solicitor and client, or to any further allowance, either from the fund or from petitioner. This proposition is sustained by the great weight of authority.

WHEREFORE, petitioner respectfully prays that its application for a writ of certiorari may be granted.

FRANK H. MOORE,
CYRUS CRANE,
A. F. SMITH,
Attorneys for Petitioner.

SAMUEL W. MOORE,
*Of Counsel.*

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

G. C. HAND, being duly sworn, says:

I am Vice-President of The Kansas City Southern Railway Company and make this affidavit in its behalf. I have read the foregoing petition, and the same is true of my own knowledge, information and belief.

G. C. HAND.

Subscribed and sworn to before me
this 9th day of January, 1929.

BARBARA STOIBER
Notary Public,
New York County
County Clerk's No. 436, Reg. No. 0-75
Term expires March 30, 1930

I hereby certify that I have examined the foregoing petition, and in my opinion the petition is well founded, and the case is one in which the prayer of the petitioner should be granted by this Court.

SAMUEL W. MOORE,
Of Counsel for Petitioner.

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OCTOBER TERM, 1928.

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THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

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*v.*

GUARDIAN TRUST COMPANY,
Henry C. Flower, Receiver *Respondent.*

## BRIEF IN SUPPORT OF PETITIONER'S APPLICATION FOR CERTIORARI.

FRANK H. MOORE,
CYRUS CRANE,
A. F. SMITH,
*Attorneys for Petitioner.*

SAMUEL W. MOORE,
*Of Counsel.*

January 7, 1929.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1928.

| | |
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| THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Petitioner, v. GUARDIAN TRUST COMPANY, Respondent. | No. ..... |

## BRIEF IN SUPPORT OF PETITIONER'S APPLICATION FOR CERTIORARI.

### The opinions delivered in the courts below.

The official report of the opinion of the circuit court of appeals for the eighth circuit, sought to be reviewed herein, will be found in 28 F. (2d) 233. There were two opinions rendered in the district court, not yet officially reported. The first opinion, delivered in June, 1923, will be found in the record (Rec. 691); and the second opinion,

NOTE:—The transcript of the record brought to this Court consists of two volumes. The first, in point of time, is a copy of the record in the original case in this Court, in *Guardian Trust Co.* v. *The Kansas City Southern Ry. Co.*, reported in 240 U. S. 166. References to its pages are as follows: "(S. C. Rec. .....)." The second volume is a transcript of subsequent proceedings in the district court and circuit court of appeals for the eighth circuit. References to its pages are as follows: "(Rec. .....)."

rendered in March, 1926, will be found in the record (Rec. 704). The Trust Company appealed to the circuit court of appeals for the eighth circuit from the decree (Rec. 128) following the second opinion.

## Jurisdiction.

This application for a writ of certiorari to the circuit court of appeals for the eighth circuit is made under section 240 of the Judicial Code, as amended (28 U. S. C. A. sec. 347). The decision of that court was handed down on May 18, 1928 (Rec. 722-749). A motion for a rehearing was filed by petitioner on July 16, 1928 (Rec. 751-821), and was overruled on October 18, 1928 (Rec. 821). This application is made within three months after the overruling of said motion for a rehearing and after the entry of the decree sought to be reviewed by this Court.

## Statement.

We desire to supplement the brief outline of the facts and proceedings contained in our Application, by a statement of the case so far as deemed material to a consideration of the questions presented, with appropriate page references to the printed record.

### The bill of the Cambria Company.

This litigation had its inception in September, 1900, when the Cambria Steel Company, a judgment creditor of the Belt Company, filed a creditor's bill (S. C. Rec. 3) in the federal court at Kansas City, Mo., against the Trust Company, the Belt Company, and others.

The complaint alleged, in substance, that the Trust Company, prior to the year 1887, conceived and entered upon the plan and purpose to cause to be constructed a number of railroads, including that of the Belt Company, by various corporations, all to be organized by the Trust Company, and to be officered with officers and directors of the Trust Company, and thereby completely to dominate and control the actions of such railroad and other companies, and their several officers and directors; that it was the plan and purpose of the Trust Company to gather unto itself all the profits and other advantages accruing in the premises, and to foist upon such railroads, including the Belt Company, any losses that might be sustained or liabilities that might result in the premises.

It was further alleged that in carrying out its said plan and purpose, the Trust Company assumed the position and duty of trustee and agent in managing and disposing of the bonds, stocks, funds and other assets of such railroad and other companies, in trust for the use and benefit of the parties who might become concerned or interested therein; and that, consequently, the relation of the Trust Company to each and all of such railroad and auxiliary companies was that of principal, bound and charged with the duty to indemnify and protect the railroad and other companies, so employed and utilized in any particular transaction, against any and all losses, burdens and liabilities arising in the premises.

Then followed allegations as to the various companies organized and officered by the officers and directors of the Trust Company, and the various transactions whereby it was alleged losses had been sustained and, through the domination and control of the Trust Company, unlawfully charged to the Belt Company, and unlawful profits and

charges made at the expense of the Belt Company, resulting, on March 31, 1899, in an apparent, but not a real, indebtedness of the Belt Company to the Trust Company in the sum of approximately $360,000; that on said date promissory notes were caused to be given by the Belt Company to the Trust Company to evidence its alleged indebtedness, and the Belt Comuany was caused to pledge with the Trust Company all its available securities as collateral to secure the same; that the giving of the notes and collateral was done fraudulently, through such domination and control, in anticipation of the insolvency and receivership of the Gulf Company, which occurred the following day, April 1, 1899; and the prayer was for an accounting, for a cancellation of the alleged indebtedness from the Belt Company to the Trust Company, the subjection of the collateral to the payment of complainant's debt, and for an injunction to restrain a threatened sale by the Trust Company of said collateral.

**The Trust Company's answer to the bill of the Cambria Company.**

The answer of the Trust Company (S. C. Rec. 33) denied the allegations of the bill, and particularly denied the existence of any trust relations in the following language (S. C. Rec. 42):

> Denies that in carrying out any of its plans and purposes as alleged in the bill of complaint the defendant assumed the position and duty of trustee and agent in managing and disposing of the bonds, stocks, funds and other assets of said railroad companies and auxiliary companies in trust, and for the use and benefit of the parties who might become interested therein, as alleged in the bill of complaint; and denies

> that as a consequence of any such alleged position the relation of this defendant to any of such railroad companies and auxiliary companies in any wise became or was as principal bound and charged with the duty to indemnify or protect any such railroad or auxiliary company in any transaction against any loss, burden or liability, as alleged in the bill of complaint. Denies that it became the duty of the defendant, as to persons becoming interested in any of said railroad companies or auxiliary companies as creditors, to dispose of the stock, bonds, funds or other assets of any such railroad companies or auxiliary companies for the use and benefit of the persons interested therein, or who might become interested therein as creditors or otherwise, as alleged in the bill of complaint.

The Trust Company expressed a willingness to render a full and true account to the Belt Company, and to furnish all such information whenever thereunto lawfully and properly requested. It said (S. C. Rec. 48):

> . . . Notwithstanding the fact that the said Belt Company has at all times had full and true accounts and knowledge of all the transactions between it and this defendant as aforesaid; yet, if, for any reason, it desires further accounting or information as to any of the said matters or things, this defendant is ready and willing and hereby offers again to render a full and true account and to furnish all such information, whenever thereunto lawfully and properly requested.

Under the bill of the Cambria Company, the issue was one of debt or no debt between the Belt Company and the Trust Company.

**The ancillary bill.**

The ancillary bill of the Belt Company and its receivers, under which the accounting was carried on, was filed in November, 1901 (S. C. Rec. 97), pursuant to stipulation (S. C. Rec. 890) which consented that the accounting sought should be expedited, and also required that the Belt Company should be a co-complainant with the receivers. This ancillary bill, as appears from the stipulation, superseded a so-called cross-bill, previously filed by the receivers as sole cross-complainants. The receivers became parties complainant pursuant to the instructions contained in the order appointing them (S. C. Rec. 29). The ancillary bill was substantially the same as the bill of the Cambria Company. It sought an accounting and a cancellation of the alleged indebtedness. An amended and supplemental ancillary bill was filed in March, 1905 (S. C. Rec. 202), in the nature of a surcharging and falsifying of the accounts brought in by the Trust Company (Rec. 15). A further amended ancillary bill was filed (S. C. Rec. 392), by stipulation (S. C. Rec. 391), in July, 1906, at the close of the taking of testimony, to conform the pleading to the proof. Its allegations are summarized by the master (S. C. Rec. 584, *et seq.*).

**The Trust Company's answer to the ancillary bill.**

The Trust Company answered the ancillary bill, in December, 1901 (S. C. Rec. 115), admitting the community of officers (S. C. Rec. 148), but denying that it had dominated and controlled the railroad companies, including the Belt Company. It also sought to justify its action in the various matters complained of, and offered to make such further accounting as might be desired. It said (S. C. Rec. 148): "The Trust Company has at all times stood ready, and is

still ready and willing, to make such further accounting thereof as may by the court be required."

And, again, it said (S. C. Rec. 155):

> These defendants further state and show that they are ready and willing, if in the judgment of this court, they ought and should do so, to render a fuller accounting of any and all of the transactions of the Trust Company with any and all of said companies, in such manner and at such times as the Court may direct.

A similar answer, but pleading laches and the state statutes of limitation (S. C. Rec. 370), was filed (S. C. Rec. 312) to the first amended ancillary bill of complaint, and also (S. C. Rec. 461) to the second ancillary bill of complaint.

Under the ancillary bill of the Belt Company and its receivers, the issue was one of debt or no debt between the Belt Company and the Trust Company.

**The intervening petition and the Trust Company's answer.**

Petitioner became a party to the litigation by intervening petition (S. C. Rec. 166), filed by stipulation (S. C. Rec. 164). It charged that the Gulf Company, the Belt Company and the Air Line had executed mortgages covering after-acquired property, the lien of which attached to certain of the collateral held by the Trust Company, or to the properties represented thereby; that petitioner, as purchaser at foreclosure sales of the properties of those companies, had become the owner thereof, and demand was made for the securities or the properties which they represented.

The answer of the Trust Company (S. C. Rec. 186) contained a denial of the allegations of the intervening peti-

tion, pleaded laches and the state statutes of limitation (S. C. Rec. 198), and further alleged (S. C. Rec. 199-201) that by reason of the reorganization of the Belt Company, petitioner had become liable for its debt to the Trust Company.

This liability issue, which thereafter became the dominant issue in the action, was one which the Trust Company itself injected into the case in 1905. It is largely the attorneys' fees and other expenses of the Trust Company incurred in litigating this issue which it now seeks to impose upon petitioner.

By stipulation (S. C. Rec. 267), petitioner was permitted to file an amended intervening petition, and to include therein its claim against the Trust Company for alleged breach of trust as trustee in the mortgage made by the Union Terminal Railroad Company; and the Trust Company consented that the issues so made should be referred to the special master, and waived any objection it might make to said intervening petition on the ground of multifariousness or other formal matters.

The amended intervening petition (S. C. Rec. 269) was substantially the same as the original pleading, except that (S. C. Rec. 288) it alleged that it was the duty of the Trust Company, under the mortgage of the Terminal Company, to see that as the bonds of the Union Terminal Railroad Company were sold, the proceeds thereof were used in the construction, completion and equipment of the railroad of the Union Terminal Railroad Company, and alleged a failure to perform this duty.

The answer of the Trust Company (S. C. Rec. 293) in the main followed its answer to the original intervening petition, but denied the alleged trusteeship in the matter complained of, asserting that no duty was imposed upon it, either by law or by the express terms of the mortgage, to

see that the bonds as sold were used in the construction of the railroad, saying (S. C. Rec. 307):

> Respondent denies that either by law or by the express terms of said mortgage it was the duty of respondent to see that as said bonds were sold, proceeds thereof should be used in the construction, completion and equipment of said railroad. On the contrary respondent says that there was no such duty imposed either by the terms of said mortgage or by law.

Under the intervening petition of petitioner, the issue was two-fold; first, was petitioner the owner of the collateral security, or the properties represented thereby? Secondly, did petitioner assume the debt of the Belt Company?

**The charge of fraud.**

Much is said in the opinion of the lower court about the charge of fraud. It is true that fraud was charged on both sides; but the fraud charged against the Trust Company was in the nature of constructive fraud (26 C. J. 1061), arising from the relation of the parties, the common officers and directors controlling the corporations in question, and the alleged misuse by the Trust Company of the power derived from this community of interest, within the rule of the *Geddes* case, 254 U. S. 590.

The master did not feel that charges of actual fraud were involved in complainants' bills, except in the one instance of the transfer of collateral security by the Belt Company to the Trust Company on March 31, 1899, on the eve of the insolvency of the Gulf Company and the prospective loss of control by the Trust Company over the affairs of the Belt Company. The ancillary bill is summarized by

the master (S. C. Rec. 584-592). The word "fraud" does not occur. The word "fraudulent" occurs but once (S. C. Rec. 592), and is there used to characterize the said transfer of the collateral security. In this connection, the master finds (S. C. Rec. 754) that when this transfer was made, the officers of the Trust Company knew that the Gulf Company would default in its interest and that receivers would be appointed for it, and that that would likely mean that the Trust Company would not thereafter have a controlling influence in Belt Company matters. These facts fairly justified the charge that the transfer was fraudulent.

The allegations of the intervening petition of petitioner are summarized by the master (S. C. Rec. 735-742). Neither the word "fraud" nor "fraudulent" appears.

The master's conception of complainants' bill was not that it abounded in charges of fraud, as suggested by the lower court, but that it was based upon the alleged domination and control by the Trust Company of the Belt Company. In this respect he says (S. C. Rec. 641):

> The underlying theory, upon which complainants' bill is grounded, is that the Trust Company dominated and controlled the Suburban Company, afterwards the Belt Company, and its constituent companies, and also, the subsidiary companies named in the bill, by virtue of causing the employees, officers and directors of the Trust Company to be elected officers and directors of the Suburban Company, and other corporations, and thereby placing the agents, employees and officers of the Trust Company in charge of such companies, respectively, so that these companies might be dominated and controlled at the behest and in the interest of the Trust Company, and, which complainants allege was done, continuously, through the period of years intervening between the incorporation of these companies and April, 1900,

> when what was known as the Stilwell management of the Belt and allied companies, lost control, and the Southern Company, and those associated with it, acquired control thereof through the receivership and foreclosure proceedings, mentioned in the bill.

The Trust Company itself did not feel that charges of gross fraud or misconduct had been made against it. It deliberately took the position that the charges made were of constructive fraud, and not "actual fraud." This is a matter of record. The intervening stockholders of the Trust Company characterized the bill as "a mere cry of domination and constructive fraud" (S. C. Rec. 963). In the "Answer of Guardian Trust Company on rule to show cause," filed in the lower court on December 16, 1907, it is said, in paragraph 13 (S. C. Rec. 558):

> There is no valid cause of action against this defendant set up in the said ancillary bill of complaint; *no actual fraud is charged therein* and said bill presents a legally meaningless theory and an impossible case.

The foregoing statement is signed by Mr. Rosenberger and Mr. Mecartney, both counsel for the Trust Company at that time, *and is sworn to by the former.*

It thus appears that it was the deliberate opinion of the Trust Company in 1907, about a year after this case had been argued for two weeks before the special master, when the whole matter was fresh in the minds of counsel, that no "actual fraud" had been charged against it.

**The accounting before the master.**

As before stated, the Trust Company in its answer (S. C. Rec. 48, 148, 155) consented to an accounting, and by its stipulation (S. C. Rec. 891) agreed that the accounting should be had and expedited. The lower court, in March, 1908, in an unreported decision in this case, held that this stipulation evidenced the full consent of the Trust Company to an accounting. It said: "It (the Trust Company) has consented that the master take an accounting, finding and report as to the respective rights and claims of the parties to the property, notes, bonds and claims involved." Judge Trimble, counsel for the Trust Company when its answer was filed consenting to an accounting, consulted with his partners before that course was determined upon (Rec. 278).

New counsel for the Trust Company having come into the case, they raised before the master, in February, 1905, the right of complainants to an accounting, and the master ruled "that, under the circumstances, there shall be an accounting in this case"; and the Trust Company then demanded that complainants in the ancillary bill "specify the items of this long and complicated account which are in dispute here." Whereupon counsel for complainants in the ancillary bill, at the request of the Trust Company and in response to its motion, announced his intention to file, and afterwards filed, an amended bill surcharging and falsifying. This appears from a fragment of the proceedings before the master, found in the record, pages 14-15.

A large amount of testimony was taken before the master. It appears from an affidavit filed in the lower court that there were 6950 pages of oral evidence and 27,592

pages of documentary evidence, principally copies of vouchers and records. The case was argued for two weeks before the master in July, 1906 (S. C. Rec. 1023). The master's report was filed in May, 1910 (S. C. Rec. 575). It recommended (a) that the Trust Company's claim against the Belt Company be reduced by three items, aggregating $21,850 and interest, and sustained as to all other items; (b) that the lands of Central Improvement Company, which cost $169,349.60 (S. C. Rec. 280) and which were referred to in argument as having a value of $300,000 to $400,000 (S. C. Rec. 952), be conveyed to petitioner; and (c) that petitioner was not liable in any way for the floating indebtedness of the Belt Company (S. C. Rec. 887).

**The decree of June, 1910, and subsequent proceedings.**

The lower court overruled all exceptions to the master's report and entered a final decree (S. C. Rec. 903), carrying out the recommendations of the master. The Trust Company appealed to the circuit court of appeals for the eighth circuit, which reversed the decree of the lower court (201 Fed. 811; 211 Fed. 696). Petititioner thereupon appealed to this Court, which affirmed the decree of the circuit court of appeals (240 U. S. 166). Petitioner, in April, 1916, paid the Trust Company $821,623.28 (Rec. 129), as the full amount of its claim, with interest. This proved to be an overpayment, which was adjusted in the final decree of May, 1926 (Rec. 130).

**The decree of May, 1926, and subsequent proceedings.**

Six years later, in October, 1922, the Trust Company moved in the district court for a final decree in accord-

ance with the mandate of this Court (Rec. 15). The lower court in its first opinion, in June, 1923 (Rec. 691), reached the conclusion that costs should be taxed as between solicitor and client, and appointed a master (Rec. 20) to ascertain and state all items of costs and expenses paid or incurred by the Trust Company, "including among other expenses those for attorneys' fees, counsel or solicitor fees, stenographers' fees, expert accountants' fees, printing fees, traveling expenses, and other expenses incurred in the premises."

The lower court having intimated in its first opinion that the circuit court of appeals had found that the litigation was vexatious, petitioner, in December, 1923 (Rec. 33), filed a motion and application for leave to file a duly verified petition "to introduce testimony proving that this litigation was instituted and conducted on the part of each of the complainants in entire good faith," and setting out in detail the oral and documentary evidence which it desired to introduce (Rec. 34-44). *This motion was overruled, and permission to introduce testimony was refused* (Rec. 45).

The master filed his report on September 15, 1924 (Rec. 46), finding that the costs as between party and party amounted to $11,499.32 (Rec. 49), and that the costs as between solicitor and client amounted to $296,520.37 (Rec. 59). Of this latter sum, $280,867.98 was for attorneys' fees which were incurred in the litigation from beginning to end, including services in the circuit court of appeals and in this Court. Exceptions to the master's report were filed by both parties (Rec. 94, 106).

At the argument of the exceptions, the court permitted a reargument of the entire matter, and in an opinion dated March, 1926 (Rec. 704), the court reversed its former rul-

ing, and held that the law did not permit the taxation of costs as between solicitor and client in this case, but only as between party and party. A final decree in accordance therewith was accordingly entered in May, 1926 (Rec. 128).

From this decree the Trust Company appealed to the circuit court of appeals for the eighth circuit, and that court, in May, 1928, reversed the said decree of May, 1926 (28 F. (2d) 233), to review which action of the circuit court of appeals petitioner, after an unsuccessful motion for a rehearing, now presents its application to this Court for a writ of certiorari.

## SPECIFICATION OF ERRORS.

For its specification of such assigned errors as are intended to be urged, petitioner alleges that the circuit court of appeals committeed error in the following respects:

1. In holding that the opinion and mandate of this Court required or authorized the taxation of costs "as between solicitor and client."

2. In holding that "the United States courts of equity at the time of their creation became endowed with the powers, including that over costs, possessed by the English chancery courts."

3. In holding that "the federal courts of equity have jurisdiction to allow, in proper cases, costs 'as between solicitor and client'."

4. In holding that the respondent is entitled to taxation of costs "as between solicitor and client" in this case.

5. In holding that the Trust Company, as a pledgee, is entitled to taxation of costs "as between solicitor and

client," although it litigated its right to the pledged property, not in the interest of the pledgor, and not for the care, preservation or protection of the property, but in its own individual interest, and for its own personal protection.

6. In holding that the Trust Company, when sought to be charged as trustee, or with the obligations resting upon trustees, is entitled to taxation of costs "as between solicitor and client," notwithstanding the fact that the Trust Company disclaimed any trusteeship, and any and all fiduciary obligations, and was successful in maintaining this defense.

7. In holding that after the Trust Company succeeded in holding petitioner liable for the debt of the Belt Company, and in collecting from petitioner its entire debt and interest, it is entitled to taxation of costs "as between solicitor and client," upon the theory that it occupied the position of a creditor, who, in behalf of himself and others, has brought a fund into court for distribtuion, and is awarded an allowance from the fund.

8. In holding that "the whole litigation" was of a "vexatious character."

## ARGUMENT.

### I.

**The proper execution of the mandate of this Court required the taxation of costs only as between party and party, and did not require or authorize the taxation of costs as between solicitor and client.**

It is familiar law that it was the duty of the district court to which the mandate in this case was addressed by this Court, to carry it into execution according to its terms, in the light of the opinion of this Court. It could not vary it, or examine it for any other purpose than execution; or give any other or further relief, or review it, even for apparent error; nor intermeddle with it in any manner (*Ex Parte Union Steamboat Co.*, 178 U. S. 317; *Re Washington R. Co.*, 140 U. S. 91; *Re Sanford Fork & Tool Co.*, 160 U. S. 247).

So well established is this rule that this Court will grant certiorari to the court of appeals where, as here, the question "involves the construction of a prior decree of the United States circuit court affirmed by this Court" (*St. Louis, K. C. & C. R. Co.* v. *Wabash R. Co.*, 217 U. S. 247, 251). This Court will inquire into the proper execution of its own decree "either by original proceeding or in any other appropriate form" (*United States* v. *Terminal R. Assoc.*, 236 U. S. 194, 199).

This Court (240 U. S. 166) affirmed the decree of the circuit court of appeals for the eighth circuit (210 Fed. 696), which directed (pp. 723, 724) the entry by the district court of a specific decree, complete in all details, disposing of the entire controversy, *including the matter of costs.* The man-

date of this Court (Rec. 467) adjudged that said decree be "affirmed with costs," and that the Trust Company et al. recover against petitioner "twenty dollars for their costs herein expended and have execution therefor."

There are numerous references in the directions for the entry of a specific decree (210 Fed. 723, 724), to "the costs of this suit"; "the costs after as well as before the decree"; "its costs down to the entry of the decree"; with a further provision that the Trust Company shall be permitted to pursue either the Cambria Company or the Southern Company, or both of them, "until its costs are paid". After refusing to entertain, and, in effect, denying, the petition of the three stockholders for a taxation against petitioner of the amount of the Trust Company's attorneys' fees, etc., the court said: "Our conclusion is that our just course is to leave the *taxation of costs* to the court below, under the principles, rules and practice in equity."

When this Court affirmed the decree of the lower court, directing the entry of a specific decree, complete in all details, and awarding "costs", without further designation or qualification, against the unsuccessful party, and leaving the "taxation of costs" to the lower court, we submit that it could only mean taxable costs, in the ordinary acceptation of the term; that is, costs as between party and party, as the word "costs" has been used in judgments and decrees from time immemorial, in accordance with the practice of taxing costs which has prevailed in this country from the beginning; in other words, it meant *taxable costs*, as distinguished from an "allowance" out of a fund, or as distinguished from attorneys' fees fixed by statute and allowed in certain designated cases.

It is not to be assumed that this Court acted inadvertently, and that what it really intended was to import into

our jurisprudence the English system of taxation of costs, by which the losing party is to be burdened and penalized with the attorneys' fees and other expenses of the successful litigant. Nor is it to be assumed that this Court, merely by affirming a decree carrying "costs", intended thereby to overrule its long line of decisions, such as *The Baltimore,* 8 Wall. 377; *Oelrichs* v. *Williams,* 15 Wall. 211; *Tullock* v. *Mulvane,* 184 U. S. 497, and *Missouri Pacific R. Co.* v. *Larabee,* 234 U. S. 459, which, we contend, authoritatively established a rule in this country exactly to the contrary.

It seems too plain to require extended argument that if this Court had intended any departure from the ordinary practice in the taxation of costs, it would have said so in plain language. If it had intended to import the English system into our jurisprudence, it would have manifested its intention in unambiguous words, which would have sounded a warning to all future litigants that litigation thereafter was to be at the peril of paying all counsel fees in case of failure. If it had intended that the word "costs" should include "allowances", under the guise of a taxation of costs as between solicitor and client, or otherwise, it seems certain that language would have been employed which would have left no room for doubt as to its purpose.

That the word "costs" does not include attorneys' fees was authoritatively decided in this Court in *Sioux County* v. *National Surety Co.,* 276 U. S. 238. There, the action was on a surety bond, under a statute of Nebraska which provided that in such actions "a reasonable sum as an attorney's fee in addition to the amount of his recovery" may be taxed as a part of the "costs". The circuit court of appeals for the eighth circuit held (16 F. (2d) 688) that attorneys' fees were not a part of the "costs" provided for in R. S. sec. 823, 824, and, therefore, could not be allowed as

costs in a federal court. This Court, upon appeal, agreed with the lower court that such attorneys' fees are not and cannot be a part of the taxable costs prescribed by the federal statute. This Court did, however, give effect to the Nebraska statute by holding that the amount of the attorney's fee could be included in the judgment. It said (p. 243):

> That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like, allowed to counsel by Rev. Stat. sec. 823, 824.
>
> The present allowance, *since it is not costs in the ordinary sense,* is not within the field of costs legislation covered by Rev. Stat. sec. 823, 824. That the particular mode of enforcing the right provided by the state statute—i. e., by taxing the allowance as costs—is not available to the federal courts under Rev. Stat. sec. 823, 824 does not preclude the recovery. Since the right exists, the federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment.

In two other decisions of this Court, hereafter referred to (*Oelrichs* v. *Williams,* 15 Wall. 211, and *Tullock* v. *Mulvane,* 184 U. S. 497), it was held that "costs" did not include attorneys' fees. Those actions were upon injunction bonds which were conditioned to pay to defendants "all costs and damages". In both cases it was held that counsel fees, incurred in securing a dissolution of the injunction, did not come within the scope of either "costs" or "damages".

In several instances the lower courts have held that the word "costs" in a decree or in a statute is to be construed as including only taxable costs, as distinguished from allowances.

In *Kell* v. *Trenchard,* 146 Fed. 245 (circuit court of appeals, fourth circuit), the mandate of the court of appeals provided that the "costs" of the case in both the appellate and the lower court should be borne equally by the appellant and the appellees. In a taxation of costs pursuant to this direction, the lower court included an allowance to the receiver as a part of the costs properly to be divided. The action of the lower court in including the allowance to the receiver was appealed from, and reversed on appeal, the appellate court saying (p. 247):

> In decreeing the devision of costs in this court and the court below was meant only *the ordinary taxable costs of the litigation,* and not such charges and expenses as the costs of the receivership and payments and allowances to receivers; those being costs properly appertaining to the receivership, and chargeable against the *property* in the receiver's hands. Ferguson *v. Dent* (C. C.), 46 Fed. 88; Elkhorn Oil & Gas Co. *v.* Foster, 99 Fed. 495, 39 C. C. A. 615.

To the same effect are:

> *Doddridge County Oil & Gas Co.* v. *Smith,* 173 Fed. 386;
> *United States* v. *Wilson,* 193 Fed. 1007;
> *United States* v. *Smith,* 240 Fed. 756.

If the Trust Company felt that it was entitled to have the opinion and mandate of this Court broadened so as to include allowances in the nature of costs as between solici-

tor and client, it should have made an appropriate application to the Court for that purpose, and before the expiration of the term. After the lapse of the term, the provision relative to costs could not be altered (*Fairmont Creamery Co.* v. *Minnesota*, 275 U. S. 70, 73).

## II.

**We earnestly contend that the lower court committed a grave error (1) in holding "that the Federal Courts of equity have jurisdiction to allow in proper cases costs 'as between solicitor and client,'" as such jurisdiction is exercised by the English Court of Chancery, and (2) in applying that erroneous principle to the facts in this case.**

The lower court reached the conclusion, which is quoted in the above heading, and which, we contend, is wholly erroneous, by two successive steps; first, it asserts (28 F. (2d) 240) that the English courts of chancery have for several centuries possessed jurisdiction to award costs as between solicitor and client; and, secondly (p. 241), that the United States courts of equity at the time of their creation became endowed with, and now possess, the powers, including that over costs, possessed by the English chancery court.

We confidently contend that the English system of taxation of costs as between solicitor and client has never been adopted in this country; and, furthermore, that if it has ever been the law here, which we do not admit, it has been expressly repudiated, by the substitution therefor of the Act of Congress of 1853, providing for the taxation of an attorney's fee of $20 "and no other" as costs on final hearing in equity. This Court and the lower courts, have

uniformly applied this statute as the settled rule in federal jurisdiction.

Space does not permit an extended discussion of the English system of taxation of costs. It is fundamentally different from our own. Under it, attorneys' fees or solicitors' fees, which are fixed by law, are taxed against the losing party in every case, whether at law or in equity. Costs as between party and party include attorneys' fees of the adversary. Costs as between solicitor and client include a somewhat large proportion of the actual expenditures of the successful party than is allowed in taxation as between party and party.

In modern practice, however, the English system of taxation as between solicitor and client "gives little more than a taxation as between party and party" (*Giles* v. *Randall*, 1 K. B. D. 290, 296; *Daniell's Chancery Pleading & Practice*, Vol. 2, 6th Am. Ed., star page 1376, note 1).

For the purpose of showing that the English system has not only never been established in this country, but that it has been definitely and finally repudiated by our courts, we will briefly trace the historical development of the subject of taxation of attorneys' fees as costs from the beginning of our government down to date.

### Early statutes and rules of court.

On August 8, 1791, "the Chief Justice, in answer to the motion of the Attorney General, made yesterday, informs him and the bar, that this court consider the practice of the courts of king's bench, and of chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary" (*Rules and Orders*

*of the Supreme Court of the United States,* 2 L. Ed.). This in 1822 was expanded into Equity Rule 33, and in 1842, into Equity Rule 90, which latter was dropped from the equity rules February 1, 1913.

The lower court, in its opinion, apparently takes the view that the effect of these equity rules was to import into our practice the English doctrine of taxation of costs as between solicitor and client. We contend that this cannot be so, and proceed to state our reasons.

Congress, by Act of September 29, 1789, provided that the rates of fees in the circuit and district courts of the United States, in equity cases, should be in accordance with those allowed by the chancery court of the state. The Act of May 26, 1790, continued the Act of 1789 until the end of the succeeding session, and it was again continued by the Act of February 18, 1791, until the end of the next session. The Act of March 1, 1793, provided for the taxation in the circuit courts of the United States of such attorneys' fees and counsel fees "as are allowed in the Supreme or Superior Courts of the respective states." The Act was continued another year by the Act of February 25, 1795, and was again continued by the Act of March 31, 1796, for the term of two years, and from thence until the end of the next session of Congress thereafter (Report of Mr. Justice Nelson, 1 Blatchford C. C. 652).

Is it not entirely clear that Congress, in these enactments, was declaring its own policy with respect to the taxation of attorneys' fees as costs? It deliberately adopted the policy of applying the rules of the state court where the federal court was sitting, as the rules in its own court. If it had desired to adopt the English practice, in that behalf, it seems certain that it would have said so. At that period in the development of our judicial system, the extent

to which the forms, precedents and practice of the mother country should be followed, was receiving the earnest attention of Congress. Its failure to adopt the English practice can only be regarded as an intentional repudiation of it in favor of its own rules.

**Early decisions of this Court.**

The first case in which there was presented to this Court the question of whether or not attorneys' fees might be taxed as costs, was *Arcambel* v. *Wiseman*, 3 Dall. 306, 1 L. Ed. 613, decided in 1796. In that case an allowance of $1,600 as counsel fees had been included as a part of the damages allowed by the circuit court, but this Court ordered the disallowance of this item, saying:

> We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, until it is changed, or modified, by statute.

Then followed *The Apollon*, 9 Wheat. 362, decided in 1824, and *Canter* v. *Ins. Co.*, 3 Pet. 307, decided in 1830, in both of which the decision was rendered by Mr. Justice Storey, and in both counsel fees were allowed. Both cases, however, were explained, as we shall see later, as having been decided as they were because the Act of 1853 was not then in force. In *Day* v. *Woodworth*, 13 How. 363, decided in 1851, the court held that attorneys' fees could not be included in an award of exemplary damages.

Prior to the statute of 1853, the practice with respect to the taxation of attorneys' fees as costs may be said to have

lacked uniformity; the general rule being that such costs were to be taxed in accordance with the varying practice in the state where the court was sitting. But this lack of uniformity is in itself conclusive evidence that the English system had not been adopted, for had that system been adopted, we would find uniformity, instead of uncertainty. The report of Mr. Justice Nelson, above referred to, was published in 1842, and disclosed not only the lack of uniformity in federal court practice, but the necessity for some uniform rule applicable to federal courts wherever sitting.

**The Act of 1853, and its construction by this Court.**

The Act of 1853 (28 U. S. C. A. sec. 571, 572) was intended to meet this demand for uniformity. It provided that certain specified fees "and no other" shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, and that on a final hearing in equity or admiralty, a docket fee of twenty dollars shall be taxed. It is as follows:

> Sec. 571. The following fees and no other shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, and to district attorneys, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.
>
> Sec. 572. On a trial before a jury, in civil or criminal causes or before referees, or on a final hearing in equity or admiralty, a docket fee of $20:

> *Provided,* That in cases of admiralty and maritime jurisdiction, where the libelant recovers less than $50, the docket fee of his proctor shall be but $10.

This statute is in itself conclusive evidence of the complete repudiation of the English practice, if it ever existed in this country. Our courts thereafter recognized it as once and for all settling the question of the taxation of costs, and limiting the taxation of attorneys' fees in the stipulated manner.

The effect of the statute was before this Court in 1869, in *The Baltimore,* 8 Wall. 377. The court there reviewed not only the prior legislation, referred to above, but the practice which had prevailed prior to the Act of 1853, pointing out the lack of uniformity. It held, in effect, that the Act was intended to standardize the practice in federal courts; that while attorneys might charge their clients reasonably for their services, nothing could be taxed as costs against the opposite party, as an incident to the judgment, except the costs and fees prescribed and enumerated. It also held that *The Apollon,* 9 Wheat. 362, and *Canter* v. *Ins. Co.,* 3 Pet. 307, which were cited in the brief of the appellees, were inapplicable because decided before the Act of 1853. The Court said (p. 392):

> Fees and costs, allowed to the officers therein named, are now regulated by the Act of the 26th of February, 1853, which provides, in its 1st section, that in lieu of the compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners and printers, the following and no other compensation shall be allowed.
>
> Attorneys, solicitors and proctors may charge their clients reasonably for their services, in addi-

> tion to the taxable costs, but nothing can be taxed as cost against the opposite party, as an incident to the judgment, for their services, except the cost and fees therein described and enumerated. 10 Stat. at L. 161. They may tax a docket fee of $20 on a final hearing in admiralty, if the libelant recovers $50, but if he recovers less than $50, the docket fee of the proctor shall be but $10. The Canton, 21 Law. Rep. 473; The Liverpool Packet, 2 Sprague 37; The Connestoga, 2 Wall. Jr. 116.
>
> Reference is made to two cases where counsel fees were allowed, but it is a sufficient answer to those cases to say, that they were decided before the Act of Congress under consideration was passed. They do not, therefore, furnish the rule of decision in the case before us.

This decision would seem definitely to settle any question of the taxation of attorneys' fees as costs in excess of the amounts named in the statute. It is difficult to imagine the English doctrine as surviving after this decision.

But if there was any lingering doubt upon this subject, it was completely dispelled by the decision of this Court in *Oelrichs* v. *Williams,* 15 Wall. 211. This was an action on an injunction bond. The condition of the bond was that the obligor "should pay and satisfy all costs and damages that may accrue to the obligees, or either of them, by reason of said injunction, in case the same shall be denied." The question was squarely presented, therefore, as to whether counsel fees were included in the words "costs and damages." The injunction was in effect for a period of four years, eight months, sixteen days. Doubtless, it presented circumstances of great hardship. Both the master and the lower court allowed counsel fees, paid in securing a dissolution of the injunction, as a part of the

costs and damages covered by the bond. This was reversed. The Court, after referring to *Arcambel* v. *Wiseman, supra,* and other cases, said (p. 231):

> The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to, and we think is substantially determined by that adjudication. In debt, covenant, and assumpsit, damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured Some counsel demand much more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.
>
> We think the principle of disallowance rests on a solid foundation, and that *the opposite rule is forbidden by the analogies of the law and sound public policy.*

This comprehensive ruling should be accepted, we respectfully submit, as completely settling and disposing of the question of the taxation of counsel fees, as costs, in

this country. Such costs may not be taxed in equity cases, even where the litigation is unjust, on one side or the other, and however large the expense may be. The reasons are given. The parties stand upon a footing of equality. There is no fixed standard, in this country, by which counsel fees can be determined, as there is in England. Some counsel demand much more than others, and more counsel may be employed than are necessary. There is great danger of abuse if it be known in advance that fees, unregulated by law, are to be paid by the other party. Additional litigation would be necessary to determine the fees to be taxed. Counsel fees do not come within the designation of "costs," nor of "damages." Their disallowance rests on a solid foundation, and the opposite rule is forbidden by sound public policy as well as by the analogies of the law.

This Court, in subsequent cases, has assumed, without further re-examination of the question, that this decision has settled the law in this country. In *Tullock* v. *Mulvane,* 184 U. S. 497, the action was upon an injunction bond, which, as before, was conditioned to pay to defendant "all costs and damages." It was again insisted that attorneys' fees were properly allowed as an item of cost or damage upon the bond, and again denied. The Court said (p. 511):

> . . . it remains only to consider whether the attorneys' fees were properly allowed by the court below as an element of damages on the bond. That they were not *is settled.*

The Court then refers to *Oelrichs* v. *Williams, supra,* and concludes with the statement:

> It follows from what we have stated that there was error committed in allowing the recovery of attorneys' fees as an element of damage upon the bond in question.

The question next came before this Court in *Missouri, K. & T. R. Co.* v. *Elliott,* 184 U. S. 530, and was disposed of briefly in the following statement:

> Having thus disposed of the question of jurisdiction, we come to the merits of the case. It suffices to say, for the reasons given in the opinion in Tullock *v.* Mulvane, before referred to, 184 U. S. 497, that there was error committed by the Kansas City court of appeals in affirming the action of the trial court in allowing, in the judgment by it rendered, attorneys' fees as an element of damage upon the injunction bond contrary to the controlling rule on this subject enunciated by this court, by which the courts of the United States are governed in requiring the execution of such instruments.

The lower court, in its opinion in this case, after referring to some of the cases above cited, among them, *Arcambel* v. *Wiseman, The Baltimore, Oelrichs* v. *Williams,* states that "such refusals (to tax attorneys' fees as costs) were not based upon any lack of power in the court, but because it was not deemed wise policy to allow attorneys' fees to be taxed as costs in ordinary equity cases."

We respectfully submit, however, that it was a lack of "power" to impose attorneys' fees as costs which impelled this Court to decide as it did. This is made entirely plain in *Missouri P. R. Co.* v. *Larabee,* 234 U. S. 459, where the question arose over the imposition of attorneys' fees by a state court in respect of an appeal prosecuted to this Court. The question is there stated by the Court (p. 468):

> First. The question of the *power* of the court to make the allowance for professional services rendered in this court on the former writ of error.

It will be noted that the Court was here discussing the *power* to make the allowance, and not the equitable principles which control some allowance which it has the power to make. The Court held against the existence of the power, as follows:

> There can be not doubt that, tested by the general principles of law controlling in this court, by the *statutes of the United States* relating to the subject, or the rules of this court concerning the same, the award for the attorneys' fees in question was *absolutely unwarranted.* We do not stop to review and expound the settled line of authority demonstrating this result because it would be wholly superfluous to do so, as the principles have been so long the settled rule of conduct in this court, and are so elementary as to require not even a reference to the cases. Some of the cases, nevertheless, we cite: Arcambel *v.* Wiseman, 3 Dall. 306; Day *v.* Woodworth, 13 How. 363, 372; Oelrichs *v.* Spain (Oelrichs *v.* Williams), 15 Wall. 211, 230, 231; Tullock *v.* Mulvane, 184 U. S. 497, 511 *et seq.*

It will be noted that the cases cited above are the same cases to which we have referred heretofore. They are referred to in the opinion of this Court as establishing a settled line of authority demonstrating the lack of *power* to tax counsel fees as costs. The prior interpretation of the Act of 1853 is reaffirmed.

The right and duty of the chancellor in proper cases to make "allowances" for expenses and counsel fees within the rule of *Trustees* v. *Greenough,* 105 U. S. 527, is well recognized, and is not at all in conflict with the views above expressed with respect to the taxation of attorneys' fees and other expenses, as costs, in cases like the one under consideration. It is a general principle that the trust

estate must bear the expenses of its administration. It is also a general principle that where one of many parties having a common interest in the trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself or by a proportionate contribution from those who accept the benefit of his efforts. This rule, however, has, we contend, no application whatsoever to the present case. Its inapplicability to the facts in this record is discussed under subsequent headings.

**Decisions of Circuit Courts of Appeal.**

The federal courts of appeals have, without exception, followed the statute of 1853, and the rule established by this Court in the foregoing cases, that, in the absence of authorizing statute, attorneys' fees in excess of $20 may not be taxed as costs as between solicitor and client, to be paid by one of the parties to the suit. The decision of the lower court is in conflict with the decisions of circuit courts of appeal of other circuits, now to be referred to.

In *McIntosh* v. *Ward*, 159 Fed. 66, the court of appeals of the Seventh Circuit held that attorneys' fees could not be taxed as costs in a partnership accounting case. In its opinion the court said, in reference to the allowable items of expense:

> Such allowances were of statutory origin. Our statute of 1853 . . . provides what shall, as costs, "be included in and form a portion of a judgment or decree against the losing party." . . . In our opinion the discretion of a court of equity does not authorize it to require one party . . . to pay to the other,

> under the name of costs, items paid from the fund for services and expenses in administering a suit properly in court, nor any other items not within a fee bill act.

*Fraser* v. *Cole,* 214 Fed. 556, was a suit by a legatee to enforce his claim against an executor and reach real estate fraudulently conveyed by her. The district court added to the decree an allowance of $1,000 solicitor's fees. The court of appeals for the seventh circuit said:

> No law of Illinois warranted the increase of Grace Fraser's indebtedness by such an addition. . . . Nor can equity in a suit upon a creditor's bill or a vendor's lien bill enlarge the defendant's debt in that way.

*Leary* v. *United States,* 257 Fed. 246, was a fraud case in which the successful party sought to have his attorneys' fees taxed against the losing party. The court of appeals for the fourth circuit said:

> The costs that can be taxed against the losing party . . . are little more than nominal, and the winner is therefore out of pocket for the fees of his counsel. If this be unjust to the one found to be in the right, it is because the law gives him only the amount of his recovery and the scanty sum allowed as taxable costs.

In *Motion Picture Patents Company* v. *Steiner,* 201 Fed. 63, the district court allowed an attorney's fee of $150.00 in each of two cases because of the vexatious conduct of plaintiff's counsel in the litigation. The court of appeals for the second circuit held that an attorney might be compelled to pay certain costs for vexatious conduct by virtue of Section 982 of the statutes, but that the costs could not be taxed against the client.

In *Marks* v. *Leo Feist,* 8 Fed. (2d) 460, attorneys' fees were taxed as costs in a copyright case. The court of appeals for the second circuit held that while such fees were taxable under the copyright law:

> The general rule, which is subject to some exceptions, of course, is that each party to a litigation must pay his own counsel fees, no matter how unjust the litigation may have been, or how great may have been the *expensa litis* (citing the Arcambel and Oelrichs cases).

We respectfully contend that the decision of the lower court is contrary to the statute, contrary to the decisions of this Court, and contrary to the decisions of federal courts of appeal in other circuits.

**Counsel fees incurred after the decree of June, 1910.**

We earnestly contend that, for the reasons above stated, the law does not authorize or permit the taxation against petitioner of *any* of the attorneys' fees or other expenses of the Trust Company during the entire period of this litigation. For the purpose, however, of bringing into impressive relief what we regard as one of the glaring errors of the lower court, we desire, for the moment, to lay to one side all other controverted matters, and to direct the attention of the Court to the proceedings in this case following the final decree of June, 1910—the period during which a considerable portion of the Trust Company's liability for attorneys' fees were incurred. The grave injustice of imposing these expenses upon petitioner appears to us to be so plain and obvious that a brief reference to the uncontradicted facts should suffice.

The decree of the lower court, in June, 1910, was against the Trust Company, and, accordingly, it appealed to the circuit court of appeals. As has been heretofore pointed out, the issue—the personal liability of petitioner for the debt of the Belt Company—was an exceedingly difficult one, and involved in much doubt and uncertainty. The *Boyd Case* (228 U. S. 482, April, 1913) had not then been decided. Finite minds could not tell what the decision in our case would be. The circuit court of appeals recognized the serious and difficult nature of the controversy when it permitted two arguments and handed down two elaborate opinions. This Court held, May 11, 1914, that the nature of the case was such as to warrant the grant of its writ of certiorari, in case an appeal did not lie. The decree of the circuit court of appeals was affirmed by this Court; the Chief Justice and one Associate Justice dissenting.

Upon what conceivable principle can petitioner be condemned to pay the Trust Company's attorneys' fees and other expenses, involved in its appeal to the circuit court of appeals, and involved in petitioner's appeal to this Court, to determine this liability issue, which the Trust Company itself injected into the litigation in 1905, in its answer to the intervening petition of petitioner? What warning was there in the books of text writers or in the decisions of the courts, saying to petitioner, in effect: "If you resist the Trust Company's appeal to the circuit court of appeals, or if you appeal from that court to the Supreme Court, you do so at your peril of being mulcted for the attorneys' fees and other expenses of the Trust Company, in the event that you are unsuccessful"?

What becomes of the guaranty, declaratory of the public policy in the jurisdiction where the litigation was carried on, that "The courts of justice shall be open to every

person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay" (Const. Mo., Art. II, Sec. 10).

The right of free access to the courts is fundamental in our theory of Government. In *Straus* v. *Victor Talking Mach. Co.*, 297 Fed. 791, 798 (circuit court of appeals, second circuit), it is said: "Free access to the courts must neither be denied nor penalized."

In *Missouri Pacific R. Co.* v. *Larabee*, 234 U. S. 459, the right of a state to impose attorneys' fees upon the losing party in an appeal to this Court was denied on the ground that if that were permitted, "the right to freely seek access to the Supreme Court of the United States would cease to exist."

In *Wetmore* v. *Mellinger*, 64 Iowa, 741, it is said:

> The courts are open and free to all who have grievances and seek remedies therefor, and there should be no restraint upon a suitor, through fear of liability resulting from failure in his action, which would keep him from the courts.

The imposition of the Trust Company's expenses incurred following the final decree of June, 1910, can only be justified upon the assumption that petitioner, instead of resisting the Trust Company's appeal to the circuit court of appeals, should have filed a confession of error, and permitted a perfunctory reversal of the decree; and, further, upon the assumption that petitioner should have refrained from prosecuting an appeal from the circuit court of appeals to this Court, although this Court stood ready to issue its writ of certiorari if the appeal did not lie. Such an assumption passes the limits of reason. Petitioner would

have betrayed its stockholders if it had taken any other course than the one it pursued. Upon what theory should it now be penalized?

## III.

**The fact that complainants sought unsuccessfully to charge the Trust Company with the duties and obligations of a trustee, does not entitle it to the taxation of costs as between solicitor and client.**

The complainants charged that the Trust Company at all times dominated and controlled the Belt Company and the other corporations officered by it, and that by reason of such domination and control, the Trust Company assumed towards them the position and obligations of a trustee. In the Cambria bill, it is alleged that the Trust Company did "assume the position of trustee and agent in managing and disposing of the bonds, stocks, funds, and other assets of said railroad companies, and auxiliary companies, in trust and for the use and benefit of the parties who might become concerned or interested therein; . . . including particularly creditors thereof and your orator" (S. C. Rec. 6). The Trust Company in its answer to the Cambria bill denied, as above stated, that it assumed the position or the obligations of a trustee (S. C. Rec. 42).

The issue was thus made by the pleadings. On the one hand, it was alleged that the Trust Company has assumed the position and relation of a constructive trustee, and, on the other hand, this was emphatically denied. The master found that the Trust Company did not thus assume the position and obligation of a trustee, and his finding was approved by the lower court.

In these circumstances, the lower court held, erroneously, we contend, that the Trust Company was entitled to the taxation of costs as between solicitor and client, or that an allowance should be made in its favor by analogy to the law giving trustees their disbursements in the execution of their trusts.

The law is plain, we respectfully submit, that the rule imposing attorneys' fees as costs in favor of a trustee has no application. The reason is that there is no trustee, no *cestui que trust*, and no fund that is being handled or administered. The parties therefore occupy the position of ordinary litigants.

The applicable rule was thus stated in *Perry on Trusts*, 6th Ed., 1911, sec. 896:

> But where plaintiffs bring a bill against defendants for the purpose of creating a trust fund—as if they bring a bill to convert defendants into trustees under a constructive trust, or to compel the defendants to hold certain property in their hands for plaintiffs—the defendants can have costs only as between party and party, if the plaintiffs fail; for the suit in such case turns out to be between strangers.

In *Lewin on Law of Trusts*, 12th Ed., p. 1267, it is said:

> But if plaintiffs take proceedings for the purpose of creating a fund, of which the defendants would be trustees for the plaintiffs, if the plaintiffs succeeded, but the plaintiffs fail, the defendants are entitled as against the plaintiffs to costs only as between party and party.

In *Tiffany & Bullard on Trusts and Trustees*, p. 714, it is said:

> As those costs taxed between solicitor and client are termed trustee's costs, it follows that they will not be taxed in a case where that relation or character does not exist.

It is likewise the rule that where a trustee disclaims his trust, he is entitled only to his costs as between party and party. (*Godefroi's Law of Trusts,* Third Ed. (London, 1907), p. 28; *Daniell's Chancery Practice,* Ed. 7 (1901), Vol. 1, p. 1011; *Mohun* v. *Mohun,* 1 Swanston's Reports (1818), 201; *Bulkeley* v. *The Earl of Eglington,* 1 Jur. (1855) 994; *Norway* v. *Norway,* 2 Mylne & Keen's Rep. (1834), 278; *Heap* v. *Jones,* 5 W. R. (1856), 106; *Bray* v. *West,* 9 Simons Rep., 429.)

The same considerations apply to so much of the intervening petition of petitioner as complains of the Trust Company's action with respect to the Union Terminal bonds. A complete answer to the Trust Company's claim for indemnity is found in the fact that the intervenor sought to impose upon the Trust Company the duties and obligations of a trustee with respect to the use of the Union Terminal bonds and their proceeds. It invoked the provisions of the mortgage itself, and the implications thought to arise from the terms of the mortgage, to establish this relationship, and so to make the Trust Company a trustee with respect thereto.

The Trust Company, although a trustee in the mortgage of the Union Company, in its answer denied the existence of any such trust relations, either by law or the express terms of the mortgage, and specifically denied that any duty rested upon it to see that, as said bonds were sold, the proceeds were used in the construction, completion and equipment of the railroad. This defense was sustained by the master (S. C. Rec. 876).

We have, therefore, on the part of the intervenor, an assertion of a trust relation with respect to the disposition of the bonds and their proceeds, and, on the part of the Trust Company, a denial that any such trust relationship existed. The master found this issue in favor of the Trust Company, and thereby it was established that no such trust relation existed, or ever had existed.

In other words, the intervenor sought to hold the Trust Company to the duties and obligations of a trustee, in respect of the disposition of the bonds, or their proceeds, and failed to establish its claim in that behalf. The trustee relationship not being established, the authorities, referred to above, hold that there is no ground for a claim of indemnity.

## IV.

**The litigation conducted by the Trust Company for its own benefit with respect to the collateral security, does not entitle it to the taxation of costs as between solicitor and client.**

The Trust Company, on March 31, 1899, the day before the receivership of the Gulf Company, took from the Belt Company, or received from it, the collateral security in question, consisting of stocks, etc.—everything, in fact, which the Belt Company had at the time, which could be used as collateral. All of this the Trust Company proceeded to hold as security for the debt which it alleged the Belt Company owed to it. When this litigation came on, on September 6, 1900, receivers were appointed of all the assets of the Belt Company (S. C. Rec. 29), of every kind and nature. Later a receiver was appointed for the Northern Townsite Company (S. C. Rec. 914), whose stock

was a part of the collateral in question; and a receiver was also appointed for the Central Improvement Company (S. C. Rec. 162, 163), whose stock was also a part of the same collateral. A receiver was also appointed for the Elevator Company (S. C. Rec. 162).

The litigation between the Cambria Company, the Belt Company and its receivers, on the one hand, and the Trust Company, on the other, concerned solely the question of debt or no debt as between the Belt Company and the Trust Company. As this should be determined, the collateral automatically would remain with the Trust Company or return to the Belt Company or its creditor, the Cambria Company.

It cannot be contended that the Trust Company, in litigating the issue of debt or no debt, was acting in the interest of the Belt Company, which was the pledgor of the collateral. It was acting adversely to the Belt Company, as well as to petitioner, which was the owner of the stock of the Belt Company. *It was acting solely in its own interest, to protect its own individual claim.*

Nor was it seeking to protect the collateral security itself, for it needed no protection. It simply remained throughout the litigation as the pawn or pledge to be awarded to the successful party when the litigation should end. The only dealing with the collateral during the entire litigation was the sale by the Trust Company, under orders of the court, of certain Northern Connecting bonds and coupons, for which $40,001.25 was realized and held by the Trust Company in special deposit until the final decree, in which it was ordered to be applied upon the Trust Company's debt (S. C. Rec. 907). That part of the collateral which possessed value, consisting of the property of the Central Improvement Company and, in lesser degree, of the

Northern Townsite Company, was being administered by the receivers of those properties, under the direction of the court (S. C. Rec. 914).

The Trust Company performed no services whatsoever for the benefit of the pledgor, or for the benefit of the collateral itself. It was performing no duties as pledgee or trustee. Its services were rendered, and its efforts expended, in protecting its own interest. In these circumstances, there is, we respectfully submit, no rule of law which permits the Trust Company, as trustee or pledgee, to impose its disbursements for counsel fees upon its adversary.

It is, of course, the ordinary rule that a pledgee has a lien on the property for any expenses, including attorneys' fees reasonably incurred by him in keeping and caring for the property pledged, protecting it against liens, taxes, assessments, etc. But our contention is that it has no application whatsoever to the facts in this case.

When we examine the reason of the rule which allows a pledgee attorneys' fees for the protection of pledged property, it becomes clear that the Trust Company does not come within it. The foundation of the rule is that the pledgee, after a sale of the pledged property, must credit the pledgor with the net amount realized by him from the proceeds. If he has been put to expense in order to protect the property pledged, for illustration, if he has been compelled to pay an incumbrance to prevent a foreclosure, or forced to defend the pledgor's title, the gross proceeds must be reduced to the extent of the expense incurred in the doing of one or all these things, because done on behalf of the pledgor and for his benefit. The pledgee has the property in his possession; the pledgor is not in position to defend it against adverse claims or to protect it generally. The

pledgee, therefore, is authorized, in law, to act for the benefit of the pledgor, as his quasi-agent, in doing what the pledgor would have done had he been in possession of his property and in position to defend it.

Where, as here, suits are undertaken by the pledgee which are of no benefit to the pledgor, the reason for the rule ceases, and the rule itself has no application.

The rule and the reason for it are recognized and set forth in *Work* v. *Tibbits,* 87 Hun 352, 34 N. Y. Supp. 308.

Other decisions to the same effect are:

*Wolf* v. *Am. Trust & Savings Bank,* 214 Fed. 761 (7th Circ.);

*Smith* v. *Equitable Trust Company,* 215 Pa. 413, 62 Atl. 591;

*Willard* v. *White,* 56 Hun 581, 10 N. Y. Supp. 170.

## V.

**It is contrary to both reason and authority to base an allowance of counsel fees in this case upon the assumption that the Trust Company uncovered and brought into the constructive possession of the court a fund from which creditors of the Belt Company were entitled to be paid.**

The lower court sought to justify the imposition of costs as between solicitor and client upon the assumption that "the Trust Company in the course of litigation uncovered and brought into the constructive possession of the court a fund from which creditors of the Belt Company were entitled to be paid." This, we contend, is clearly erroneous, and the error is susceptible of plain demonstration.

We insist, in the first place, that no fund was uncovered and brought into the constructive possession of the court, within the meaning of the rule relied upon; and, furthermore, we insist that the case is governed by established principles which prohibit the allowance of counsel fees in the circumstances shown in this case. Before coming to a discussion of these questions, we call attention to the following considerations:

The decree of the lower court, which this Court affirmed, did not order the distribution of any fund to creditors. It merely awarded a personal judgment against petitioner, for the amount of the Belt Company's debt, with the return of the collateral upon payment of the debt, and with a sale of the collateral upon a failure to pay the debt. It was a personal judgment, which has long since been paid in full, in favor of the Trust Company, and this judgment did not inure to the benefit of any one else.

At no time did the Trust Company assert any claim except its own. There can be no pretense that it was acting for the benefit of any creditor. Its claim that petitioner was liable for the debt of the Belt Company is stated in its answer to the amended intervening petition of petitioner (S. C. Rec. 311), and is asserted solely in its own behalf. It is in the nature of a legal claim, as distinguished from an action in equity. The suits in state courts upon the same cause of action (S. C. Rec. 502) were actions at law, triable by jury (R. S. Mo. 1919, sec. 1398).

Not only was the property of the Belt Company not a trust fund, in any substantial sense, but it was not in the possession of any court at the time the Trust Company asserted its claim in 1905, nor has it been in the possession of any court since that time. The property of the Belt Company, as appears from the Trust Company's answer (S. C.

Rec. 295) was sold in November, 1901, at foreclosure sale, and was purchased by petitioner, which ever since that time has had exclusive possession thereof. Manifestly, the stock of petitioner, which was issued in exchange for the stock of the Belt Company in the reorganization (if that be regarded as a "fund"), has never been in the possession of any court.

The lower court conceives that its decision with respect to the discovery and administration of a fund is supported by *Trustees* v. *Greenough,* 105 U. S. 527, and decisions of that character. Those cases hold, in general, that where one litigant, at his own expense, has either created, preserved or protected a fund, and others were entitled to claim, and did claim, the results of his labors, it was not fair that the persons who have taken the risk and cost and expense of the litigation should bear all the costs, but those who share in the fruits should bear their pro rata share of the expense. The rule goes no further than where meritorious results have actually been achieved, those who, by inaction, seek to await the result and escape all expense if the case be lost, but if successful, to share the actual benefits by receiving their portion of this success, should not be allowed to do so without contributing their share of the expense (*Buell Case,* 201 Fed. 762, 768).

**The lower court's ruling is in direct conflict with the applicable authorities.**

The total inapplicability of this rule to the case at bar is manifest, for several reasons, which we now point out:

(a) In this case, the court did not take charge of, administer, preserve or distribute any fund. It awarded a money judgment, in favor of the Trust Company and

against petitioner, which has long since been paid in full. The rule of the *Greenough* case, which permits the making of an allowance to counsel, does not apply. This, because the result of the litigation was "a general personal judgment, without segregating a fund in kind, and bringing its corpus into a court of equity for distribution."

This rule is stated clearly and emphatically by the Supreme Court of Missouri in *Johnson* v. *United Rys. Co.*, 247 Mo. 326, 350, 152 S. W. 362, the jurisdiction where this litigation was carried on. There, an action in equity was brought in behalf of complainant and other creditors to subject to the payment of their debts certain property which the debtor had transferred in fraud of creditors. There was a money judgment for complainant, and his motion for an allowance of attorney's fees was denied. The court held that the rule of the *Greenough* case had no application, saying:

> With cases of that ilk eliminated, there is left to consider a doctrine of equity, viz., that a trust fund of right should bear the expenses of its own administration. According to that rule, it has been held that where a transaction has been ripped up or a conveyance set aside for fraud and an estate has been uncovered and recovered, which, in equity, belongs to creditors, and that estate is held in the hollow of the chancellor's hand to be administered and distributed, attorney's fees may be allowed as part of the trust administration. White *v.* University Land Company, 49 Mo. App. 450; Trustees *v.* Greenough, 105 U. S. 527, 26 L. Ed. 1157; Central Railroad, etc. *v.* Pettus *et al.*, 113 U. S. 116, 28 L. Ed. 915; Woodward *v.* Mastin, 106 Mo. loc. cit. 364, 365, 17 S. W. 308. Agreeably thereto are an array of other cases industriously collated in Mr. Gilliam's brief *pro se*. But it seems to us their doctrine does not apply here. This be-

> cause the power of a court of equity is flexible enough to measure out relief in cases of this kind by a general personal judgment, without segregating a fund in kind, and bringing its corpus into a court of equity for administration. Accordingly, here the judgment was a general money judgment against Railways Company. It stopped short at that point. It administered no fund. It took this form apparently by consent of the parties; at least, no one took exception to that feature. In such fix, the case falls within the doctrine of the general rule, viz., that in Missouri one litigant cannot be compelled to pay the attorneys' fees of another, either in equity or at law. Pickel *v.* Pickel, 147 S. W. 1059, not yet officially reported. It appears that Johnson contracted that Mr. Gilliam on top of a named percentage might have all attorney's fees the court allowed. That friendly turn added no virtue to movent's position. In that aspect it dealt with a bird (not in hand, but) in bush. We hold the motion well ruled.

This rule applies squarely to the case under consideration. Here, there was a general money judgment against petitioner. The decree stopped short at that point. It administered no fund. The case therefore falls within the doctrine of the general rule, in federal courts as well as in the state courts of Missouri, that one litigant cannot be compelled to pay the attorney's fees of another, either in equity or at law.

(b) Even where a creditor sues in equity for the benefit of himself and all intervening creditors, and obtains a decree for complainant and such creditors, *and the complainant and such creditors receive the full amount of their debts, with interest and taxable costs*, the complainant is not entitled to an allowance for solicitor's fees out of the surplus otherwise payable to the debtor.

In this case, the only creditor was the Trust Company. It did not sue for the benefit of other creditors who might come in and assert their claims. The Trust Company's debt became merged in a personal judgment, and that judgment, with interest, has been paid, and the taxable costs have been paid. Upon what theory of law is the Trust Company entitled to impose the burden of its counsel fees upon the surplus of the trust fund (assuming there was a trust fund), belonging to petitioner?

The authorities deny the validity of a claim of this nature. One such authority is *Huff* v. *Bidwell,* from the fifth circuit, 195 Fed. 430, where it is held:

> Where a judgment lien creditor sues in equity for the benefit of himself and all intervening creditors, and obtains decree for complainant and such creditors, and the defendant's property condemned and sold to satisfy debts exceeds the amount of debts and interest and costs, the complainant is not entitled to an allowance for his solicitor's fees out of the surplus otherwise payable to the debtor after full payment of all the debts and costs.

The court said (p. 431):

> In creditors' suits, the underlying principle upon which those who do not appear as plaintiffs are charged with a proportionate part of the solicitors' fees is that the plaintiffs represented, and were suing for, the others; and this agency is generally shown by the appearance of the other creditors in court propounding their claims and claiming to share in the result of the suit. Lamar *v.* Hall & Wilberly, 129 Fed. 79, 83, 63 C. C. A. 521; Farmers' Loan & Trust Company *v.* Green, 79 Fed. 222, 24 C. C. A. 506; Hand *v.* Railroad Company, 21 S. C. 162. But the plaintiff in this case in no sense represented

> Huff, the defendant. The suit was not brought for his benefit. There was no just reason for seizing more of his property than would pay his debts, principal and interest, and the costs of suit. The property having been sold for a sum in excess, the proceeds necessarily came into court; but it was never the purpose of the suit to accomplish more than the collection of the debts and costs. *If no creditors had intervened, if the suit had been brought by the plaintiffs to enforce and collect their judgments only, is there any known principle upon which Huff could have been made responsible for the plaintiffs' solicitor's fees?* The intervening of the creditors may in such cases oblige them to contribute to the payment of the fee; but such interventions impose no obligation on the defendant who is sued. On principle, it seems to us that this fee cannot be added to Huff's indebtedness.

The sentence which we have italicized has accurate and precise application to this case. Here, no other creditors did intervene. The Trust Company sought to enforce and collect its claim only. Is there, therefore, any known principle upon which petitioner can be made responsible for the Trust Company's solicitors' fees?

In 20 Cyc. 825, the rule is thus stated:

> Upon a conveyance by a debtor being set aside as fraudulent, at the suit of a creditor, and a sale of the property being ordered, the creditor's attorney may be allowed a fee out of the proceeds; but such fee should be paid out of that part applicable to the demands of creditors, and not out of such balance as may come to the debtor after the liquidation of the debts proven and passed.

The foregoing quotation is cited and followed in *Pickel* v. *Pickel*, 243 Mo. 641, 665, in a case where, at the

suit of a wife, a conveyance by a husband was set aside as fraudulent as to her rights of maintenance.

To the same effect are: *Waggener* v. *Mars*, 27 S. C. 97, 2 S. E. 844, 846; *Miller* v. *Kehoe*, 107 Cal. 340.

If there had been in this case a fund in the possession of the court for administration and distribution (we insist there was not), the utmost limit of recovery by the Trust Company and other creditors (assuming there were others, although, in fact, there were not) would be the full amount of their respective claims, with interest, diminished by their proper proportion of any allowance made for counsel fees. The amount distributable to the Trust Company, plus its pro rata share of the allowance of counsel fees, might equal, but could not exceed, the amount of its claim, with interest. In other words, the Trust Company would pay its proportion of counsel fees out of its own distributive share; and the same would be true of other participating creditors.

The result is the same, in principle, where, as here, the Trust Company was the only creditor. The amount awarded it in this case was the full amount of its claim, with interest, and, accordingly, on both principle and authority, the Trust Company should pay its own counsel fees out of the proceeds of its judgment.

Certainly, there is no equity in requiring petitioner to pay out of its share of the true fund (assuming, as before, that there was one), the expenses of the Trust Company's counsel, who rendered no service whatsoever for petitioner, and whose activities were wholly in conflict with its interest.

(c) Not only was the Trust Company awarded a money judgment, which has been paid, and not only does the Trust Company seek to impose its claim for counsel fees upon

the part of the trust fund (if there was one) remaining after the only creditor in the action has been paid in full, but the fact remains that the Trust Company's effort in this litigation was solely made in its own behalf, and in an endeavor to protect its own selfish interest; and the rule applies that in such cases there can be now allowance of counsel fees (*Groves* v. *Sentell*, 153 U. S. 465, 486; *Hauenstein* v. *Lynham*, 100 U. S. 483, 490; *Pike* v. *Cincinnati R. Co.*, 179 Fed. 97, 103; *Riddle* v. *Hudgins*, 58 Fed. 490, 494; *Boothe* v. *Coal Co.*, 72 Wash. 679; *Attorney General* v. *Ins. Co.*, 91 N. Y. 57; *Savage* v. *Sherman*, 87 N. Y. 285).

## VI.

**The statement in the opinion that the entire litigation was vexatious, is entirely unwarranted for the reasons: First, it is wholly unsupported by the record; secondly, it is in conflict with the opinion and mandate of this Court in this case (240 U. S. 166); thirdly, the record, as it stands, shows affirmatively the complete good faith of petitioner and the others associated with it during the entire litigation; and, fourthly, petitioner was wrongfully denied the right to introduce evidence in its own behalf upon that issue.**

We feel strongly that the lower court's characterization of the entire litigation as vexatious is highly prejudicial and grossly unfair to petitioner and to counsel who instituted the litigation in the beginning and who have conducted it since that time. We feel, however, that the limits of a brief in support of an application for a writ of certiorari have been reached, and perhaps passed. We are constrained, therefore, to ask the indulgence of the Court

by referring it to what has been said upon this topic in our motion for a rehearing (Rec. 754-775). What is there said represents our views upon the subject, and most effectively, we respectfully submit, meets and refutes the lower court's charge that the litigation was vexatious. To repeat here what is there said would, we fear, prolong this brief beyond reasonable bounds.

Respectfully submitted,

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